

ATTACHMENT 1

Comments on Tentative Order No. R8-2009-036 – Draft San Bernardino County MS4 Permit, Fact Sheet, and Monitoring and Reporting Program

September 9, 2009

RE: Comments on Tentative Order No. R8-2009-036 – Draft San Bernardino County MS4 Permit, Fact Sheet, and Monitoring and Reporting Program

Thank you for the opportunity to provide comments on the Draft Areawide MS4 NPDES Permit for San Bernardino County within the Santa Ana River Watershed (Draft Permit). The San Bernardino County Flood Control District (SBCFCD) provides these comments as the Principal Permittee, on behalf of all the San Bernardino County Permittees.

We provided informal comments on a preliminary version of the Draft Permit on June 23, 2009, many of which were incorporated into the subject Draft Permit that was released for public comment on June 26, 2009. In the time since the Draft Permit was released, we have conducted several meetings of our Stormwater Program's Permit Renewal Subcommittee, and many of the Permittees have provided individual comments. While there are many, relatively minor changes and corrections that have been suggested that vary among the Permittees, we have found that the main priority issues of concern are common to all. We presented comments on several of the highest priority issues at the Regional Board's Public Workshop on August 3, 2009.

Since the public release of the Draft Permit, our Permit Renewal Subcommittee has also met with Regional Board staff, including Stormwater and TMDL staff, and the Executive Officer on July 23, August 6, and August 23, 2009. During these meetings we discussed suggested revisions of the Draft Permit to address our concerns, and most of these suggestions are described in this letter and attachments.

We appreciate that the Regional Board granted an additional 30 days for comment beyond the original August 10 deadline. However, due to the complexity of the Draft Permit, the significant short and long-term economic implications of Permit implementation, the ongoing need to involve all departments and management levels in this review process, and time required for adequate legal review, we are still actively reviewing the Draft Permit. Therefore, these comments are not entirely comprehensive and we intend to provide further comments in the future.

An additional concern is the parallel review and comment process currently taking place regarding the Riverside County Draft MS4 Permit for the Santa Ana River Watershed. We share many issues with the Riverside County MS4 Program, including the Bacteria TMDL for the Middle Santa Ana River. It has proven essential to track the Riverside County renewal process. However, this effort has stretched our staff resources and we have not been able to review and coordinate fully with Riverside County and Regional Board staff on the Riverside County Draft MS4 Permit.

Permit Components and Consistency

Our review and discussions with Regional Board staff have primarily been focused on the main body of the Draft Permit. We have also more recently reviewed the Monitoring and Reporting Program (MRP), and the Fact Sheet. We believe it is essential that

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these components of the Draft Permit be consistent internally, and with each other. We identified numerous inconsistencies among these documents in our review so far, and with additional revisions expected, it is imperative that a consistency review be conducted periodically and immediately prior to release of a second Draft Permit. We have therefore, attached redline versions of the MRP and the Fact Sheet, and will submit a redline version of the main body of the Draft Permit under separate cover within one week.

The comments below are focused on the most significant issues of concern that we have identified to date. We describe these issues and propose revisions or alternatives, where appropriate. We have attempted to incorporate the proposed changes in “redline” versions with strikeout and underline text—some examples are included below with all redline text provided as attachments.

High Priority Areas of Concern

ECONOMIC CONSTRAINTS

As presented at the August 3 Public Workshop, it can be objectively demonstrated that the Permittees are experiencing an economic downturn that is more severe than at anytime since the first-term MS4 Permit was adopted in 1990. In contrast, the Draft Permit contains more requirements than in any previous permits and several new programs have been added. Therefore, the Permittees propose a prioritization approach to maximize effectiveness of available resources. As further discussed below, the Permittees also believe that some of the requirements in the Draft Permit constitute unfunded mandates under Article XIII.B.6 of the California Constitution.

TECHNICAL ISSUES

Comments on Reporting Schedule

The Permittees request a number of changes to the reporting schedule contained in the Draft Permit. The basis for this request is as follows:

- The regional economic concerns (documented elsewhere) limit the availability of new funds for implementation of stormwater program enhancements or completely new stormwater programs.
- The Cities and County anticipate that their respective 2010-2011 stormwater program budgets will be similar or lower than budget for the current fiscal year.
- A revised reporting schedule allows permit requirements to be spread out over the five year term of the permit rather than front-loaded, i.e., many of the requirements in the Draft Permit are scheduled for completion within the first two years.

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To support this request, we have prepared a revised reporting schedule that, in general, prioritizes permit requirements as follows:

- **Priority Activities** – During recent meetings, Regional Board staff indicated three key priorities for implementation: Incorporation of Low Impact Development (LID) into the program; revision of the Water Quality Management Plan (WQMP); and establishment of Local Implementation Plans (LIP). These high priority, time-intensive, elements are proposed for completion within only 18 months of permit adoption. Assuming a December 2009 adoption date, these items would be completed during the remaining portion of the current and 2010-2011 fiscal years – the period of time of expected greatest concern for regional (city and counties) budgets.
- **Program Enhancements** – The draft permit includes requirements for enhancing various program elements, e.g., risk-based prioritization of inspections; revised BMP materials, establishment of a post-construction BMP database. The Permittees request that, in general, the reporting schedule establish completion dates that are within 18 to 36 months of permit adoption.
- **New Programs** – The Permittees request that the reporting schedule for permit requirements representing new stormwater programs or program elements establish completion dates that are within 36 to 48 months of permit adoption. Examples of these new permit elements include the residential and mobile business BMP programs and adoption of pathogen control ordinances. The Watershed Action Plan (WAP) also generally falls within this category; however, as will be noted below, the Permittees request that this program element be significantly revised. As such, the schedule revision for this program is discussed under “Other Program Requirements”.
- **Other Program Requirements** – The request for revised reporting schedules for a few permit requirements is complex, i.e., permit deliverables are spread out over a number of years.

The following comments provide additional detail regarding the requested changes to the reporting schedule. We have attached a Gantt chart to illustrate requested reporting schedule changes by category.

Priority Activities

Low Impact Development - The Permittees have serious concerns about the feasibility of incorporating certain LID elements in the Draft Permit. While the Permittees encourage the use of LID elements, where feasible and practicable, it appears that data

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about the effectiveness and costs associated with LID practices is limited. EPA, itself, recognizes that more research is needed to quantify the environmental benefits associated with LID practices. Nonetheless, in general, the Permittees agree with the schedule established in the Draft Permit for the development of LID elements, where it is determined that such elements are feasible. The Permittees propose to incorporate a feasibility analysis into the LID process, rather than as a separate requirement (X.E.6.a.vi.). However, it may not be possible to implement the LID program elements within the specified 12 month time frame, particularly those elements that may require changes to City and/or County codes allowing the establishment and implementation of such programs.

Water Quality Management Plan - The Permittees agree to the schedule for WQMP development and implementation as established by the Draft Permit, and do not request any changes to the reporting schedule associated with WQMP revisions.

Local Implementation Plan - The Draft Permit requires that the Permittees develop a LIP within 12 months of permit adoption. The schedule for LIP development was discussed at the August 6, 2009 Regional Board/Permittee meeting. It was agreed that the schedule for development of the LIP would be revised as follows: (1) within 6 months of permit issuance, the Permittees will develop an area-wide model LIP for use by individual Permittees; (2) within 18 months after permit issuance, the Permittees will prepare and adopt LIPs for each of their jurisdictions. To implement this approach, the following permit changes are requested:

- III.A.2.a – Section edited to (1) include a 6 month period for development of the area-wide model LIP by the Principal Permittee; and (2) revise the schedule for the Principal Permittee's LIP adoption from 12 months to 18 months.
- III.B.1 - Section edited to revise the schedule for each Co-Permittee's LIP adoption from 12 months to 18 months following permit adoption.
- XI.C.4 – Section revised to indicate that WQMP revisions be incorporated into the LIP within 18 months of the adoption of the Order.
- XV.A – Section edited to revise the schedule for inclusion of *de minimus* discharge information into the LIP from 12 to 18 months.

The reporting schedule table was revised to (1) incorporate preparation of an area-wide LIP model; (2) change the schedule for Principal Permittee and Co-Permittee LIP adoption; and (3) change the schedule for incorporation of *de minimus* discharge information.

Program Enhancements

Septic System Program (IX.F) - The Draft Permit requires completion of this activity within 24 months of permit adoption. The Permittees request that this schedule be

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extended to 36 months. This activity is an enhancement to an existing program, and as such, its completion is a lower priority.

Public Education BMP Guidance (XII.E) – The Draft Permit requires completion of this activity within 12 months of permit adoption. The Permittees request that this schedule be extended to 24 months. Existing BMP education programs already address most pollutants, and there are existing BMP resources available from other sources. Accordingly, completion of this task is a lower priority

Post Construction Database Activities (XI.I.2, XI.J.3) – The Draft Permit requires development of a database to track operation and maintenance of post-construction BMPs within 12 months of permit adoption. The Permittees request that this schedule be extended to 18 months. The slightly extended schedule provides time for this activity to be linked with the LIP, LID and WQMP priority activities since several elements of post-construction database development relate to these permit requirements.

Risk-Based Inspections (X.A.3) – The Draft Permit requires development of a risk-based inspection program within 18 months of permit adoption. The Permittees request that this schedule be extended to 24 months. An existing inspection program is already in place. Development of a risk-based program was a recommendation of our ROWD and we appreciate the opportunity to develop this revised approach for conducting inspections. However, given that this is a program enhancement and not a high priority permit requirement, we request that the reporting schedule for this permit element be extended.

Program Guidance Review & Revision (III.A.1.n) - The Draft Permit requires completion of this activity within 6 months of permit adoption. The Permittees request that the reporting schedule for this permit activity be extended to 18 months. This extension will allow much more thorough consideration of LID and WQMP changes when reviewing program guidance.

Effectiveness Evaluation (XVIII.B) - The Draft Permit requires that the Permittees propose changes to how program effectiveness is evaluated as part of the first annual report completed after permit adoption. We request that the schedule be revised so that this evaluation occurs when the second annual report after permit adoption is in preparation, i.e., October 2011. We believe that the effectiveness evaluation is an important program assessment tool and its development should consider the LID, WQMP and LIP program elements that will be under development in 2010-2011. Extending the reporting schedule to fall 2011 provides the opportunity to include these priority permit elements when proposing changes to the program effectiveness evaluation.

New Programs

Mobile Business BMP Program (X.D.6; X.D.7) – The Draft Permit requires completion of two activities associated with mobile businesses within 12 months of permit adoption. The Permittees request that this schedule be extended to 36 months for the following reasons: (1) The establishment of a mobile business BMP program represents a new

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stormwater program element; and (2) the development of new BMP materials, notification program, and enforcement strategy will require additional resources and should take into account the outcome of the risk-based inspection program recommended for completion within 24 months (see above). By moving the completion date to 36 months, resources expended on initial permit priorities (e.g., WQMP revision and LIP development) can be shifted to this program area later in the permit term.

Residential BMPs (X.E.1) – The Draft Permit requires development and implementation of a residential BMP program within 12 months of permit adoption. The Permittees request that this schedule be extended to 36 months and that the reporting requirement in X.E.7 be adjusted accordingly. This requirement creates a new BMP program which will require significant coordination and outreach with Homeowner Associations (HOA). This effort will require additional program resources. Similar to the Mobile Business BMP program, by moving the completion date to 36 months, resources expended on early permit requirements can be shifted to this program area later in the permit term.

Pathogen Control Ordinance (VII.D) – The Draft Permit requires development and full implementation of a pathogen control ordinance within 36 months of permit adoption. The Permittees request that this schedule be extended to 48 months. This request is linked to the request to modify the schedule for residential BMP program adoption from 12 to 36 months. Ideally, the pathogen control ordinance should be developed in coordination with the residential BMP program, which includes development of HOA control measures. We propose to develop the elements of this ordinance while developing the residential BMP program. Thus, a draft ordinance would be completed within 36 months of permit adoption. However, an additional 12 months is requested to provide time for each permittee to work through the ordinance adoption process.

Regional Treatment BMPs (XI.D.6, XIII.E) – Two permit requirements pertain directly to or are indirectly related to the implementation of regional treatment BMPs:

1. Recommendations for Streamlining Regulatory Agency Approval of Regional Treatment Control BMPs (XI.D.6) – This task is to be completed within 24 months of permit adoption and should include the following:

“The recommendations should include information needed to be submitted to Regional Board for consideration of regional treatment control BMPs. At a minimum, it should include: BMP location; type and effectiveness in removing pollutants of concern; projects tributary to the regional treatment system; engineering design details; funding sources for construction, operation and maintenance; and parties responsible for monitoring effectiveness, operation and maintenance.”
2. Examine Opportunities to Retrofit Existing Storm Water Conveyance Systems and Parks and Other Recreational Areas with Water Quality Protection Measures (XIII.E) – This task is to be completed within 12 months of permit adoption and includes the following:

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“...submit a proposal for additional retrofit studies that incorporates opportunities for addressing any applicable TMDL implementation plans, hydromodification management and/or LID implementation within the permitted area”

We offer the following comments in regards to the above two permit requirements related to regional BMP treatment:

- Although these permit requirements are expressed in separate sections of the permit, they have close linkages as they both involve regional BMP treatment strategies (directly or indirectly) and both involve Municipal Facilities/Activities. Accordingly, it is recommended that these requirements be combined into a single permit task under XIII.E. We have provided recommended redline changes which moves paragraph XI.D.6 into XIII.E.
- The deliverable for the Draft Permit requirement at XIII.E is unclear. .Please provide clarification regarding what “...submit a proposal for additional retrofit studies...” means. For example, what are the “additional studies” a reference to, i.e., additional to what? Is the deliverable to simply provide locations where retrofit studies would be useful, or something more detailed? .Based on our presumed understanding of the task, we have proposed revised language to focus this effort on identifying opportunity retrofit locations only.
- We request that the schedule for completion of these activities, combined under XIII.E, be extended to 36 months. .The ROWD included the activity “Evaluate Regional Treatment Alternatives”, which focused on the need to evaluate regulatory issues associated with the approval and implementation of regional treatment BMPs (see Section 5.3.2 of the ROWD). .We appreciate the opportunity to evaluate regional treatment BMPs; however, we request the extended schedule for the following reasons: (1) this activity represents a new stormwater program element and we are requesting that all new program activities be implemented later in the permit term for fiscal reasons; (2) the requirement to evaluate retrofit opportunities is an extension of the original ROWD recommendation which was focused only on regulatory issues; and (3) combining the two regional treatment BMP permit tasks adds value since the evaluation of regulatory issues will be done in the context of potential retrofit projects. .An extended schedule allows the Permittees to look at this issue in more depth when resources dedicated to other permit program efforts can be shifted to this analysis later in the permit term.

Other Program Requirements

Watershed Action Plan

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As further discussed below, the Permittees have concerns about the proposed WAP element in the Draft Permit. The schedule associated with WAP development was discussed during the August 6, 2009 meeting, and a conference call with the Regional Board on August 13, 2009. Per this discussion, it was agreed that the reporting schedule could potentially be revised to allow more time to for development of an acceptable WAP. We continue to request a revised schedule and an alternative approach to achieving the objectives of the WAP for the following reasons:

- As compared to other counties, no watershed planning of the type envisioned by the draft permit has occurred in SB County. Accordingly, many months will be required just to establish a Technical Advisory Committee (TAC) and educate the TAC on stormwater management issues.
- Other permit requirements, such as the consistency review described in permit section XI.B.4 should be coordinated with WAP development rather than occur separately as the permit currently suggests.
- The cost of WAP development, as proposed in the draft permit, will be high as the information required for incorporation into the WAP (as described in XI.B.3) is extensive. As such, the Permittees request that some of the WAP-related permit requirements be extended to allow the overall development cost to be spread out over the permit period rather than occurring mostly during the first three years.

Given these reasons, the Permittees request the following modifications or considerations to the WAP development requirements:

During the public workshops and the adoption hearing for the OC Permit, we testified with a request for the opportunity to develop a permit tailored to the needs and resources of the Upper Santa Ana Watershed area. The response to these requests from the Chair of the Regional Board was clear and sincere: we were assured a fair opportunity to develop permit conditions best suited to our Permittees in collaboration with Regional Board staff. The requirement in the Draft Permit for developing a Watershed Action Plan is clearly a program element that was conceived within the Orange County MS4 Program. This is evident from the fact that two “model WAPs” were included as part of their 2006 ROWD. Similarly, the specific requirement to form a TAC (Technical Advisory Committee) consisting of planning and engineering managers, builds from a TAC that is already active in Orange County. There is no such TAC in our permit area. It is also evident that the specific elements of the WAP in the Draft Permit are substantially expanded as compared to the Orange County MS4 (OC Permit). The OC Permit included two specific WAP objectives, whereas our Draft Permit includes 10 separate WAP objectives.

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However, we understand the need for comprehensive watershed management. In our permit area, and partially in other County areas, we have invested significant resources (over \$250,000) to develop a geodatabase of watershed attributes. This geodatabase was initially focused on evaluating hydromodification issues and was dubbed the “HCOC Map,” consistent with requirements in the third-term permit to address Hydrologic Conditions of Concern for development projects. This geodatabase will be fully complete and available as an online map resource before the end of 2009. The first set of user interfaces will address the drainage system and include “susceptibility assessments” of the potential for impacts from hydromodification. This is the backbone system for the entire permit area, and required over three years to complete.

Now, with the backbone system in place and accessible online within a few months, the Permittees will continue to enhance the geodatabase to address additional issues. Various layers have and will be added, such as all of the rare or endangered habitat areas, rainfall frequency and intensity, soil type and infiltration potential, preferred recharge areas, and additional drainage facility details such as potential regional BMP sites, specific plan overlays, etc.

Basically, we have built the geodatabase with the express intention to use it as the central watershed management tool. What is perhaps most needed is a thorough vetting of the geodatabase layers with Regional Board and other resource agencies, as well as Permittee planning and development departments. We have already worked with Regional Board and SCCWRP on the methodology to assess stream channel susceptibility to hydromodification and made a few pilot assessments. The delivery mechanism for this tool is the World Wide Web, and will be functional by the time the Draft Permit is adopted.

Therefore, we propose to work toward the objectives outlined for the WAP, using this Watershed Management Geodatabase as the central tool. We will provide additional details regarding this alternative to the WAP and a schedule, with milestones, in our supplemental comment submittal.

Training (XVI) – The existing permit requires development of a training program within 12 months of permit adoption. An existing training program is already in place. We agree that this training program will need revision as priority activities are completed and program enhancements or new programs are developed. We request that the reporting schedule be revised to extend the time over which revisions to the existing program are completed. Specifically:

- Within 24 months, the Permittees will update their existing training program to incorporate new or revised program elements related to the development of the LID program, revised WQMP, and establishment of LIPs for each Permittee.

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- Within 36 months, the Permittees will update training program elements to incorporate new or enhanced stormwater program elements due for completion within 36 months of permit adoption.
- By 48 months, the Permittees will have a completely revised training program that includes any enhanced or new program elements not previously addressed, e.g., watershed planning.

Monitoring - The reporting schedule includes the following requirement: “Submit plan to determine dry weather N/TDS baseline concentration within Permittees’ jurisdiction” within 18 months of Order adoption. The cited permit reference is MRP III.F. The cited section contains no such monitoring requirement. Please provide clarification regarding the basis for this requirement.

New Development (Section XI)--Road Project WQMP Category

The Draft Permit specifies a new “road project” category that would trigger the need to develop and approve project-specific WQMPs for “street, road, highway, and freeways of 5,000 square feet or more...” The Permittees understand the concern for pollutants that may be generated by roadways, but propose an alternative approach for these linear projects. As discussed in our meetings with Regional Board staff, road projects have built-in constraints that limit their design options and implementation of post-construction BMPs. Some of these constraints include: limited right-of-way for the construction or modification of roads; existing design and code specifications for road width, drainage, and materials; liability for diverting flows; limits on Permittee maintenance responsibility/authority for adjacent parkways where BMPs may reside; limited maintenance budgets and equipment (maintenance of “green” BMPs may require additional or new equipment, potentially reducing the level of maintenance elsewhere); and lack of approved use of pervious pavements for public roads. In addition, due to the legal and policy issues surrounding road design, approval, maintenance, and the magnitude of potential impacts from implementing “green infrastructure” concepts in these projects, more time and discussion is needed. Such policy changes must be developed and authorized by local government Boards, Councils, and regional transportation planning authorities.

Therefore, the Permittees propose to develop standard design and post-development BMP guidance to be incorporated into projects for public streets, roads, highways, and freeway improvements, to reduce the discharge of pollutants from the projects to the MEP (see attached “SB Development Section redline 090909” at XI.L). This will require time to accomplish—the Permittees propose a 24-month schedule for this task. The WQMP road category at XI.D.4.h should be deleted.

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LEGAL ISSUES

TMDLs

For the reasons discussed below, the Permittees believe that it is inappropriate at this time to impose the TMDL-based numeric limits set forth in the Draft Permit. While the Permittees recognize the need to achieve the TMDLs adopted for certain waterbodies, we believe, with respect to stormwater discharges, that imposing narrative BMP-based requirements at this time is consistent with prevailing policy and practice at the federal level, the judgment of experts convened by the state to assess this precise permitting issue, and the assumptions and requirements of the relevant TMDLs.

WLAs and Effluent Limits

As the Regional Board properly acknowledged in the Fact Sheet, both EPA and the State Water Board anticipated a non-traditional NPDES permitting strategy for urban storm water runoff. “Due to economic and technical infeasibility of full-scale end-of-pipe treatments and the complexity of urban storm water runoff quality and quantity, MS4 permits generally include narrative requirements for the implementation of BMPs in place of numeric effluent limits.” See Fact Sheet at p. 24 (emphasis added).

This non-traditional NPDES permitting strategy is integral to the “maximum extent practicable” (MEP) standard that Congress imposed on urban storm water runoff in Section 402(p)(3) of the Clean Water Act. Both EPA and California interpret this MEP standard to require MS4s to implement BMPs such as source control and pollution prevention. These BMPs may be technology driven, but as EPA made clear in the governing Phase II storm water regulations, they are inclusive of water quality-based requirements. “BMPs are the most appropriate form of effluent limitations to satisfy technology requirements and water quality-based requirements in MS4 permits.” See 64 Fed. Reg. 68722, 68770 col. 3 (Dec. 8, 1999).

More recent EPA guidance confirms the appropriateness of BMPs to meet water quality-based requirements, including TMDLs. See, e.g., Memorandum from Robert H. Wayland to EPA Regional Water Division Directors styled, *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Nov. 22, 2002) (clarifying that limits for NPDES-regulated storm water discharges subject to TMDL WLAs “may be expressed in the form of BMPs” and further, that “[i]f BMPs alone adequately implement the WLAs, then additional controls are not necessary.”). In short, EPA’s guidance calls for the imposition of BMPs to meet TMDL requirements, unless/until those BMPs are shown to be inadequate.

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EPA's decisional law also confirms this BMP approach. For example, in the NPDES case styled, *In re: Government of the District of Columbia Municipal Separate Storm Sewer System*, 2002 EPA App. LEXIS 1 (NPDES Appeal Nos. 00-14 and 01-09) (Feb. 20, 2002), EPA's Environmental Appeals Board determined that BMPs could lawfully be imposed in lieu of numeric effluent limits to meet the requirements of a TMDL.

This is not to say that TMDL-based numeric limits are never appropriate in storm water permitting. EPA policy certainly contemplates them as the exception rather than the norm, but only if they are first determined to be both feasible and necessary. See *EPA Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits* (Sept. 1996). In this case, a panel of experts convened by the State to assess this precise permitting issue has already concluded that numeric limits for MS4s are infeasible. See Blue Ribbon Panel Report, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) ("It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges."). Instead of numeric limits, the panel recommended a BMP-based storm water control strategy, consistent with prevailing EPA policy and practice.

In any event, the "assumptions and requirements" of the TMDL control the permitting process. See 40 CFR 122.44(d)(vii)(B). Here, the relevant TMDLs neither assume nor require numeric limits in the Draft Permit. To the contrary, the Middle Santa Ana River Watershed Bacterial Indicator TMDL specifically assumes that the waste load allocation will be implemented through the Permittee's Bacterial Indicator Urban Source Evaluation Plan, Municipal Storm Water Management Program, and Water Quality Management Plan, all of which are predicated on BMPs rather than numeric limits. See Resolution No. R8-2005-0001, Task 4 (Aug. 26, 2005). Moreover, the Big Bear Lake Nutrient TMDL assumes and requires a zero percent reduction from urban sources like the Permittee's MS4 systems. See TMDL Technical Report, Tables 6-1 and 6-2. In other words, it specifically allows the status quo. To the extent that the Permittee's existing BMPs preserve the status quo, additional numeric limits are not appropriate.

In short, the proposed TMDL-based numeric limits are unacceptable. Simply deferring them beyond the permit term will not address the Permittee's concerns. In fact, deferring them raises other issues, including antibacksliding (*i.e.*, imposing numeric limits now will hamper if not preclude a different approach in future permit renewal proceedings, even if the TMDLs or applicable standards change). For these reasons, we urge the Regional Board to remove the TMDL-based numeric limits and replace them with narrative BMP-based requirements.

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Antibacksliding

The Draft Permit requires MS4 dischargers to comply with previously adopted wasteload allocations for nutrients and bacteria as water quality-based effluent limitations. The permittees understand and accept the need to protect beneficial uses and implement the TMDL requirements. To that end, we continue to work closely with the Regional Board staff in several different task forces dedicated to achieving water quality standards in Big Bear Lake and the Middle Santa Ana River.

The permittees are committed to implement best management practices designed to achieve the wasteload allocations adopted by the Regional Board. However, we fear that the proposed permit language may unintentionally undermine on-going plans to develop site-specific water quality objectives throughout the area. For example, the Stormwater Quality Standards Task Force is nearing completion of a six-year effort to update water quality standards for recreational uses in the Santa Ana region. In addition, the Big Bear Lake TMDL Task Force is preparing a lake management plan to adopt biocriteria as a better measure of water quality and ecological integrity. In both cases, it is likely that the current numeric water quality objectives will be revised in the near future.

Because the wasteload allocations for nutrients and bacteria are expressed as numeric effluent limitations anti-backsliding provisions of the Clean Water Act (§402[o]) may preclude adoption of less stringent limits even if the underlying water quality objectives are changed. A more detailed explanation is provided in an article by California attorney Melissa Thorne (copy attached with Attachment 1-B).

The Permittees acknowledge the necessity of including water quality-based effluent limitations in the new MS4 permit. However, we recommend that the text be rewritten to avoid any unintentional application of the anti-backsliding rules. Specifically, the permit should require dischargers to implement BMPs designed to achieve the wasteload allocation (WLA) rather than imposing the WLA directly as a numeric effluent limit.

The use of performance-based permit conditions would obligate the Permittees to develop appropriate BMPs, submit the plan to the Regional Board for approval, implement the BMP plan upon approval of the Regional Board, monitor progress toward achieving the WLA, and revise the plan as necessary to assure effectiveness. Failure to submit the necessary plan, or to implement the BMPs in a timely manner, or to monitor/report pollutant load reductions would be deemed permit violations.

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Such an approach preserves the regulatory flexibility needed to adopt site-specific water quality objectives without diminishing the Regional Board's authority to require the Permittees to meet water quality standards. In addition, nothing precludes the Regional Board from using numeric effluent limits to assure compliance with the WLAs at some future date if the performance-based approach proves unsuccessful. Indeed, since compliance with the WLA is not mandated until 2015 (a year after the proposed permit is due to expire), there is no essential regulatory purpose served by imposing numeric effluent limits so early in the process.

There appears to be considerable uncertainty as to whether anti-backsliding rules apply to effluent limits where the final compliance date is beyond the current permit term. However, EPA guidance indicates that anti-backsliding does apply to any effluent limit, regardless of the compliance date, unless that limit is challenged at the time the permit is issued (see EPA Memorandum entitled: "Interim Guidance on Implementation of Section 402[o] Anti-backsliding Rules for Water Quality-based Permits, 1989, Section II-A @ pg. 3). Therefore, although the MS4 permittees strongly support the Regional Board's effort to reduce nutrient and bacterial pollution, they may be forced to challenge the effluent limits solely to prevent unintentional application of the anti-backsliding rules. Below are three scenarios, related to bacteria, that illustrate the basis for our concern. Similar scenarios could be constructed for the nutrient WLAs.

Scenario #1:

A stream has been added to the 303(d) list because fecal coliform data indicate the current water quality objectives for REC1 and REC2 are being exceeded. A numeric target has been established based on the recommended water quality criteria for REC1 (e.g. no more than 200 fecal coliform per 100ml based on the geometric mean of at least 5 samples collected in 30 days). If the REC1 target is achieved, then the REC 2 use is also protected because the recommended water quality criteria for REC2 are much higher (e.g. no more than 2000 fecal coliform per 100ml based on the geometric mean of at least 5 samples collected in 30 days and not more than 10% of the samples greater than 4000 fecal coliform per 100ml). A wasteload allocation has been approved by the Regional Board. The MS4 permit includes an effluent limitation of 180 fecal coliform per 100ml.

Assume the Regional Board deletes the fecal coliform objectives for REC2 from the Basin Plan and no new numeric objectives (for *E. coli*) are adopted to protect REC2 uses. Later, the Regional Board elects to remove the REC1 classification from a stream previously included on the 303(d) list. The waterbody is now listed as REC2-Only. MS4's then petition the Board to delete the effluent limitations

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imposing the wasteload allocations for fecal coliform and E. coli from the permit. Would such an action be consistent with anti-backsliding regulations considering that the effluent limitations to protect REC2 would be "less stringent" than those established in the previous permit?

Scenario #2:

A stream has been added to the 303(d) list because fecal coliform data indicate the current water quality objectives for REC1 are being exceeded. A numeric target has been established based on the recommended water quality criteria for REC1 (e.g. no more than 200 fecal coliform per 100ml based on the geometric mean of at least 5 samples collected in 30 days). A wasteload allocation has been approved by the Regional Board. The MS4 permit includes an effluent limitation of 180 fecal coliform per 100ml.

Assume the Regional Board subsequently approves a Basin Plan amendment that temporarily suspends the REC1 use during certain high flow conditions. And, the MS4s petition the Regional Board to amend the NPDES permit so that compliance with the wasteload allocation is not required when the high flow suspension is in effect. Would such an action be consistent with anti-backsliding regulations considering that the proposed effluent limitations would be less stringent than those established in the previous permit?

Scenario #3:

The Regional Board adopts a REC1 bacteria objective of 126 E. coli/100ml (as a 30-day geomean of at least 5 samples). At the time of adoption, the Board acknowledges that the objective is expected to provide a level of protection equivalent to 8 excess illnesses per 1,000 swimmers exposed. The Board also acknowledges that they can easily adopt a higher (less stringent) objective of 206 E. coli/100ml (which is equivalent to 10 illnesses per 1,000 swimmers exposed) and that EPA will accept any objective in the range of 126-206 E. coli as functionally equivalent to the previous fecal coliform objectives. The Board later concludes that it is economically impracticable to meet the more stringent objective (126) and adopts the less stringent E. coli objective (206) based on the factors identified in Section 13241 of the water code. The TMDL and wasteload allocations are revised accordingly.

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However, since the previous WLAs for fecal coliform and E. coli were imposed as numeric effluent limitations, anti-backsliding rules may preclude adoption of less stringent permit limits even though the underlying water quality objectives were revised. Water quality standards revisions are considered changes to law or regulation and are excluded from the exceptions identified in CWA§402[o][2]. What specific law or regulation would allow less stringent numeric WLAs to be adopted at a later time if the existing WLAs are adopted as numeric effluent limitations in the proposed permit?

In order to achieve the wasteload allocations specified in the TMDLs while continuing to support the existing Task Force initiatives to develop site-specific water quality objectives and more appropriate measures of beneficial use impairment, the Permittees recommend the permit language be revised. Specifically, we suggest that all references to the wasteload allocations be given in the Fact Sheet and that only actions required to demonstrate compliance with the TMDL be expressed in Section V of the Draft Permit. Proposed revisions to the existing Order are provided in Attachment 1-B: TMDL-Related Proposed Text

The Draft Permit Proposes To Include Coverage For Areas Not Under The Jurisdiction Of The Permittees

The Fact Sheet for the Draft Permit expressly recognizes that “areas not under the jurisdiction of the Permittees are excluded from coverage under this permit. These excluded areas and activities include the following: federal lands and state properties, including, but not limited to, military bases, national forests, hospitals, schools, colleges and universities, and highways; Native American tribal lands; agricultural lands; and utilities and special districts.” See Fact Sheet at p. 7.

Nonetheless, the draft Permit seeks to regulate drainage from development projects in these excluded areas by requiring that the drainage meet or exceed requirements of Permittees’ storm water ordinances, Watershed Action Plans and “any other requirements to ensure that these discharges do not cause or contribute water quality standards violation in the receiving waters. See Fact Sheet at pp. 7-8. For example, the Fact Sheet notes that there are a number of “significant contributors” of urban storm water runoff to Permittees’ MS4, including “State University facilities, schools, hospitals, etc.; federal facilities....State agencies...”--the very areas and entities that are not under the jurisdiction of Permittees and, therefore, are “excluded areas” under the Permit.

By imposing a requirement upon Permittees to ensure that discharges from these facilities “do not cause or contribute water quality standards violations,” the Permit essentially encompasses these excluded areas within the Permit coverage. This is

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evident, for example, in Section XI.A.5 of the Draft Permit, which requires that “Each Permittee shall ensure, consistent with the maximum extent practicable standard, that runoff from development projects not regulated under this Order but is allowed to be discharged into MS4s regulated under this Order is consistent with the model WQMP for the permitted area.”

This presents an impossible conundrum for the Permittees. In order to ensure that drainage from these excluded areas meets or exceeds requirements in Permittees’ storm water ordinances (and other regulatory mechanisms), Permittees must (but do not) have the legal authority to control the discharge of pollutants from these area or entities. Section VII of the Draft Permit specifically requires that “Permittees shall maintain adequate legal authority to control the discharge of pollutants to their MS4s through ordinance, statute, permit, contract or similar means and enforce these authorities” and specifies detailed authority and enforcement mechanisms to be implemented by Permittees. Permittees do not and cannot exercise legal authority over those facilities and entities that are outside of its jurisdiction. Therefore, provisions such as XI.A.5 should be deleted from the Draft Permit.

While the Permittees recognize that the management and control of the entire MS4 requires the cooperation and efforts of all these entities (e.g., federal and state facilities, etc.), the County and District believe that there are other ways to achieve the objective than by seeking to make Permittees responsible for discharges over which they lack jurisdiction. In that regard, the County and District propose to implement a notification system pursuant to which they will notify these out-of-jurisdiction entities and the Regional Board if the Permittees become aware that discharges from the out-of-jurisdiction entities are causing or contributing to water quality standards violations in the receiving waters.

Unfunded Mandate language

Article XIII B, Section 6 of the California Constitution provides, in pertinent part, that “[w]hensoever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service...” Contrary to language in Section II.B.6 of the Draft Permit, the Permittees believe that, to the extent the Draft Permit purports to impose requirements that exceed the mandate established by federal water quality laws and regulations, it constitutes an unfunded mandate subject to subvention.

For example, Section 402(p)(3)(B)(iii) of the federal Clean Water Act clearly recognizes the economic and technical infeasibility of imposing numeric effluent limits for storm water discharges. Instead, that section requires only that municipal storm water permits

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“shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques, and system design and engineering methods...” Similarly, the Regional Board noted in the Fact sheet that “[d]ue to economic and technical infeasibility of full-scale end-of-pipe treatments and the complexity of urban storm water runoff quality and quantity, MS4 permits generally include narrative requirements for implementation of BMPs in place of numeric effluent limits.”

Yet, contrary to the requirements mandated by federal law, the Draft Permit seeks to impose numeric effluent limits for storm water discharges where TMDLs have been adopted. Indeed, the Fact Sheet states that, “where TMDLs have been adopted for specific pollutants, the Permittees will shift available resources to be compliance-focused, to achieve compliance with water quality objectives.” (p. 22). In doing so, the draft Permit mandates costs that exceed the mandate under the provisions of the federal Clean Water Act (and its implementing regulations) applicable to storm water discharges. See Cal. Gov’t. Code §§ 17514 and 17556(c).

Other examples in the Draft Permit of provisions which the Permittees believe constitute unfunded mandates include, but are not necessarily limited to, the following: (1) the requirement to establish significant new surveillance, monitoring, inspection and enforcement authority in local ordinances; (2) the requirement for the Permittees to impose controls on discharges from facilities and areas that are outside the jurisdiction of Permittees (such as federal and State properties); and (3) the requirement to establish a technical advisory committee and incorporate certain elements into a Watershed Action Plan, such as incentivized development strategies for redevelopment, brownfield development, high density, vertical density, and mixed-use projects, among other things.

More generally, the Draft Permit seeks to require the Permittees to implement a watershed approach (and requires the Permittees to implement and monitor the effectiveness of a Watershed Action Plan). In doing so, the Regional Board is, in effect, shifting to the Permittees responsibilities that are uniquely assigned to and are the responsibility of the State, without providing a subvention of funds to reimburse the Permittee’s for the costs of the program. See Cal. Const. Art. XIII.B.6(c). Indeed, the very purpose of the unfunded mandate provision of the State Constitution is to preclude the State from shifting this type of financial obligation to local agencies which are ill-equipped to assume increased financial responsibilities, particularly under the current economic conditions. Certainly, the Permittees do not have authority to levy service charges, fees, or assessments to pay for compliance with all of the provisions of this Order.

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Accordingly, the Permittees request that these and other such requirements contained in the draft Permit which constitute unfunded mandates be deleted from the draft.

Comments on Tentative Order No. R8-2009-036 – Draft San Bernardino County MS4 Permit Monitoring and Reporting Program (MRP)

We have a primary, overarching, structural comment on the MRP, and a number of specific comments that are discussed individually.

MRP Structure

Our primary comments are that (1) the Draft MRP lacks a cohesive and logical organization; and (2) the Draft MRP does not provide an adequate link to Findings II.E.21 and II.E.22 of the Draft Permit, i.e., identification of the list of pollutants of concern to support a risk-based approach to monitoring. Regarding the first comment, it is difficult to understand the relationship between the various monitoring efforts and the context of the efforts to support our stormwater management program. Therefore, we recommend that the MRP should be organized around two monitoring efforts: the Integrated Watershed Monitoring Program (IWMP) and participation in the various regional Monitoring Programs. The IWMP should primarily focus on the monitoring needed to support our risk-based Stormwater Management Program, while the Regional Monitoring would support the ongoing efforts that the SBCFCD and others have agreed to conduct to further the understanding of water quality issues in the region. We have provided a suggested outline for the MRP in an attachment to this letter.

The components of the IWMP would consist of:

- Existing Baseline Monitoring
- Mass Emissions Monitoring
- Illicit Discharge/Illicit Connections Monitoring,
- Hydromodification Monitoring, and
- Source Identification and Special Studies.

For each component of the IWMP, clear monitoring requirements should be included to the extent possible. These requirements should include constituents to be collected, method of collection, frequency of collection, site locations, etc.

The Regional Monitoring Section of the MRP would present a summary of the various organizations involved in monitoring activities in the permitted area. Each Regional Monitoring Plan conducted by these various organizations would be individually described, including whether a Monitoring Plan has been completed or is required to be developed. The Regional Monitoring Section should consist of:

- TMDL related monitoring including;

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- MSAR Bacteria TMDL Watershed Monitoring Plan
- MSAR Bacteria TMDL USEP Monitoring
- Big Bear Lake Watershed Wide Nutrient Monitoring Plan
- Big Bear Lake In-Lake Nutrient Monitoring Plan
- Regional Bioassessment (SCCWRP Technical Report 539)
 - Regional Bioassessment and aquatic toxicity
- LID BMP Monitoring (BMP Effectiveness Assessment)

Additionally, the Regional Monitoring Section should reference and include as appendices the Monitoring Plans of the various Regional monitoring efforts.

Regarding the second comment, we request that Sections I (General) and II (Objectives) include language linking MRP program goals and objectives to back the findings contained in the Order. The purpose of the risk-based analysis is to focus monitoring resources on the primary water quality concerns associated with urban runoff management. The Permittees will periodically evaluate data to determine if re-prioritization of monitoring resources is necessary. For the next few years, it is clear that the focus on monitoring efforts needs to be on the highest priority water quality concern: bacterial indicators. To address this second comment, we have provided recommended changes to the draft MRP.

Specific Comments

1. Suggested additional language for Section (I.) (B.), "...or methods documented in the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)."
2. Section (I.) (C.) would be more appropriately located in the Reporting Section of the MRP.
3. Suggested revised language for Section (I.) (E.) to reflect changes to the MRP structure described above:

~~This Monitoring and Reporting Program (MRP) references three components of the monitoring program: There are two types of monitoring programs that will be referenced and described in this Monitoring and Reporting Program (MRP):~~

- ~~a. The existing storm water monitoring program shall continue to be implemented until the integrated watershed monitoring program is finalized and approved by the Executive Office;~~
- ~~b. An integrated watershed monitoring program (IWMP) that is to be developed under this MRP to identify data gaps and to attain the objectives stated in Section II below; The existing core storm water~~

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monitoring program is an integral part of the IWMP. The existing core program shall be implemented until the new IWMP developed under this order is finalized and approved by the Executive Officer; and

- c. ~~Other~~ Regional monitoring efforts where the Permittees participate or make monetary contributions, including TMDL-related monitoring.
4. For Section (I.) (F.), it is suggested that instead of a coordinated watershed monitoring plan, the MRP refer to a Coordinated Watershed Quality Assurance Program Plan (QAPP). The goal of this document would be to standardize quality assurance and data management standards for the various monitoring programs conducted under the IWMP and in the Region. The currently developed QAPPs for TMDL monitoring, LID Monitoring, and the Regional Bioassessment could be used for the Coordinated Watershed QAPP as appropriate. A separate section discussing the QAPP could be created following the Objectives section, as suggested in the attached outline. A discussion of the relationship of the Coordinated Watershed QAPP and SWAMP quality assurance documents should be included in this Section. Sections (I.) (F.) and (I.) (G.) could be combined and moved to the new Section. Suggested revised language for Section (I.) (F.):

The Permittees must coordinate monitoring efforts with other entities discharging into the Middle Santa Ana River Watershed and the Big Bear Lake Watershed. Ideally, all monitoring efforts should conform to the same quality assurance, data management, validation, and verification standards; therefore a single Coordinated Watershed Quality Assurance Program Plan (QAPP) should be used for all monitoring efforts. A previously developed QAPP may be used if an appropriate document exists, such as a TMDL QAPP, otherwise a QAPP must be developed for this purpose. The coordination must result in the development and implementation of a coordinated watershed monitoring plan, quality assurance plan, data management, validation, verification mechanism, and a consolidated report. This report may be integrated into the annual report. The Permittees should cooperate, as appropriate, with other MS4 Permittees (including those in Orange County and Riverside County) in the development of the QAPP, regional monitoring efforts, creation and maintenance of databases, and special studies.

5. The objectives of the MRP (Section (II.)) should be simplified and streamlined. The current objectives are comprehensive and complex, but are not very practical given the current knowledge of stormwater monitoring and evaluation. Additionally, they should be modified to reflect the risk-based approach discussed in the ROWD and the MSWMP.
6. The IWMP Section should be moved to a first-level Section. The contents of Section (III.) (A.) should be moved under the IWMP Section.

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7. Section (III.) (B.) would be more appropriately located in the suggested Coordinated Watershed QAPP section. The language should be revised to read “compatible with” SWAMP. Additionally, a new SWAMP QAPP was completed in July 2009.
8. Section (III.) (D.) is very vague. It is suggested that it be incorporated into the Objectives Section, or be clarified to state a specific monitoring task.
9. The Draft MRP indicates that the mass emissions monitoring stations will be used to characterize urban runoff. However, the Los Angeles Regional Board uses mass emissions monitoring to characterize the receiving water. We suggest that the mass emission stations be renamed to be consistent between Regional Boards. If the mass emissions stations are intended to monitor urban runoff, it may be clearer to call them urban discharge monitoring stations. Also, we disagree with the stated objective that the urban runoff data should be used to determine whether the MS4 is contributing to an exceedance of water quality standards. Comparing outfall data against water quality objectives is inappropriate except for informational purposes only. Specific changes to the Mass Emissions Section are suggested as follows. Section (III.) (E.) (1.) Mass Emissions (a.) (ii.): “To assess trends in mass emissions associated with urban storm water runoff from the MS4s over time ~~to correlate land use and population changes~~”. Also Section (III.) (E.) (1.) Mass Emissions (b.) (ii.) second sentence should be modified as follows: “All samples must be analyzed for E. coli, nutrients (nitrates and nitrites, potassium, and phosphorous), metals, pH, TSS, TOC, organophosphorus pesticides/herbicides, and any other constituents that are known to have contributed to impairment of local receiving waters by inclusion on the 303(d) list.”
10. Bioassessment and Aquatic Toxicity monitoring items should be moved to the Regional Monitoring Section as suggested in the attached outline. Additionally, the sampling details should be clarified to more clearly state the monitoring requirements. Item (d.) is not monitoring related and should be removed from the Section.
11. TMDL monitoring items should be moved to the Regional Monitoring Section. The TMDL Monitoring Plans should be organized as proposed above and in the suggested outline. The MRP should be revised to reflect that the MSAR Bacteria TMDL Monitoring Plan was revised and re-adopted under Resolution R8-2008-044. Elements of the TMDL Monitoring Plans related to reporting should be moved to the Reporting Section of the MRP. This includes Section (1.) (b.) (ii.) and Section (2.) (a.), second paragraph. Finally, the TMDLs do not include “pre-compliance monitoring” and thus it is inappropriate to dictate pre-compliance monitoring in addition to the TMDL Implementation Plans, other than standard BMP effectiveness monitoring. Section (2.) (b.) should be deleted.
12. Hydromodification monitoring should be moved to the IWMP Section of the MRP as suggested in the attached outline. It may also need to be renamed, to provide consistency between the MRP and Draft Permit.

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13. Section III.E.3 “Bioassessment and Water Column (Aquatic) Toxicity Monitoring” should be moved to and integrated under (III.) (I.) Regional Watershed Monitoring as suggested in the attached outline. The content of this item should be focused on the monitoring activities.
14. Several items in Section (IV.) Record Keeping are not recordkeeping related. Items 4, 6, 7, and 8 would be more appropriately located in the Coordinated Monitoring QAPP Section or the General Section of the MRP.
15. Section (V.) Program Effectiveness Assessment and Reporting should be organized according to the IWMP Section and the Regional Monitoring Section of the MRP as suggested in the attached outline. The program assessment and reporting requirements of each monitoring plan should be clearly laid out in this Section.

Proposed Additional Meetings

The Permittees request additional meetings with Regional Board staff to collaboratively work through these issues, and others. We tentatively propose biweekly meetings starting the week of September 21, 2009.

If you have questions regarding these comments, please contact me at (909) 387-8112.

Sincerely,

Matt A. Yeager
Stormwater Program Manager

Following Attachments:

- A. Proposed Alternative Draft Schedule (Gantt Chart)
- B. TMDL-Related Proposed Text (with Thorne article)
- C. Development Section--Proposed Redline Text
- D. Suggested Outline for the MRP
- E. MRP—Proposed Redline Text
- F. Fact Sheet—Proposed Redline Text